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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **EUGENE RICHARDSON,** **Defendant and Appellant.**	**A134783** **(Alameda County Super. Ct. No. C164916B)**

Eugene Richardson appeals from his conviction of first degree felony murder. (Pen. Code, §§ 187, subd. (a), 189.)[1] The killing resulted from an armed robbery in which Richardson, then aged 16, participated and during which he personally used a firearm. Upon conviction, Richardson was sentenced to 35 years to life in prison.

In this court, he raises constitutional challenges to both his conviction and his sentence. Richardson claims his conviction offends the due process clause of the Fourteenth Amendment, because as a minor, he lacked the cognitive ability to form the necessary intent. Similarly, he argues that his sentence violates the Eighth Amendment's ban on cruel and unusual punishments, because it is based on the presumption he harbored the same intent as an adult offender.

We find neither of Richardson's arguments persuasive. Accordingly, we will affirm the judgment.

[1] All statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

Because of the limited nature of Richardson's claims on appeal, a detailed discussion of the evidence presented at trial is unnecessary. We therefore set forth only those facts necessary to a proper understanding of the issues on appeal.

On the evening of October 15, 2009, Wayl Al Junaidi's mother gave him $20 and sent him to buy milk at a Walgreen's near their residence. When he left home, he had a brown trifold wallet and a diamond ring. Later that evening, a police officer responding to a report discovered the wounded Al Junaidi in a parking lot on Foothill Boulevard in Oakland. Al Junaidi later died at Highland Hospital, and a forensic pathologist testified that the cause of death was a gunshot wound. No money, wallet, or jewelry were recovered from the location at which the victim was found.

At Richardson's trial, Rodrigo Campos testified that on the night of October 15, 2009, he was cleaning up in the parking lot when he saw a red van pull up. Three men got out of the van and ran past him. Campos saw the victim walking along Foothill Boulevard and then heard a loud pop. He saw the victim fall, and then the three men ran back to the red van. One man carried a silver pistol about six to eight inches in length. The red van then drove away. Campos approached the victim, who was bloody but still alive. The entire incident lasted only three to five minutes.

Campos later repeated his story to a police investigator. He told the investigator he saw three men come out of a red van parked on 34th Avenue and walk past him as he was cleaning up the parking lot. Campos identified Richardson and another suspect from photo lineups. Campos had identified the same two suspects at the preliminary examination. He said Richardson stood over the victim and was carrying the gun when the men returned to the van.

Margarita Arreola's bedroom window looked out over the parking lot. She was home on October 15, 2009 before 11:00 p.m., and when she looked out at her car in the parking lot, she saw the tops of three men's heads. She heard a loud bang and looked out the window again. Arreola saw one man running away toward the red van, one man standing by a dumpster, and a third man struggling and arguing with the victim. The man

struggling with the victim was trying to "put his hands into the victim's sides" and "was putting his hand in one area and another as if he were looking for something[.]" The man was bent over the victim, and it looked as though he was trying to take something from him. The man with the victim wore dark pants and a dark jacket and had shoulder-length braids. After about a minute the man with the victim and the man near the dumpster ran to the red van where the third man had the engine running. Arreola saw the victim take a step and then fall to the ground.

Arreola later identified Richardson as the man struggling with the victim. At trial she remembered his face although his hairstyle was different from the braids he had worn on the night of the murder. Her identification was based on Richardson's face, which she had seen clearly when he passed by her window.

Star Rollins testified she knew Richardson for about two months because he was dating her sister. She could not identify Richardson in court, but she had identified him earlier from a police photograph. Rollins said Richardson had showed her a large man's ring with multiple diamonds on it and had asked her opinion about its value. He told Rollins he had gotten the ring in a robbery when he killed "an Arabian boy."

On November 9, 2010, the Alameda County District Attorney filed an information accusing Richardson of murder in violation of section 187, subdivision (a), a serious felony under section 1192.7, subdivision (c), and a violent felony under section 667.5, subdivision (c). The information further alleged that Richardson: (1) personally and intentionally discharged a firearm and caused great bodily injury and death (§§ 12022.7, subd. (a), 12022.53, subd. (d)); (2) personally and intentionally discharged a firearm (§ 12022.53, subd. (c)); and (3) personally used a firearm (§ 12022.53, subd. (b).) A codefendant, Davone Young, was also charged in the information, but he later accepted the People's plea offer and only Richardson proceeded to trial.[2]

[2] Although the record in Young's case is not before us, it appears he pleaded guilty to a violation of section 211 with a section 12022, subdivision (a)(1) enhancement and was sentenced to six years in state prison.

At trial, the court instructed the jury on the law of felony murder using CALJIC No. 8.21, stating, "The unlawful killing of a human being, whether intentional, unintentional, or accidental, which occurs during the commission or attempted commission of the crime of robbery, is murder of the first degree when the perpetrator had the specific intent to commit that crime. [¶] The specific intent to commit robbery and the commission or attempted commission of that crime must be proved beyond a reasonable doubt. [¶] In law, a killing occurs during the commission or attempted commission of a felony, so long as the fatal blow is struck during its course, even if death does not then result."

The court did not initially instruct the jury on the law of aiding and abetting because neither party requested those instructions. In fact, the prosecutor withdrew his request for instructions on the theory of aiding and abetting, which had been "added when both defendants were in the case." The prosecutor told the court that "the evidence suggests that this is clearly more of a felony murder." In his closing statement, the prosecutor argued to the jury, "This . . . is a felony murder." He did not argue that Richardson had aided and abetted the robbery of Al Junaidi, nor did he claim that the victim's death was a natural and probable consequence of that crime.

During deliberations, the jury made a request of the court, stating, "Need instruction from judge on felony murder, specifically if an individual is part of a robbery — but not necessarily the shooter — can they be convicted of felony murder?" After discussing the request with counsel and obtaining their agreement, the court read to the jury CALJIC Nos. 3.00 ("Principals—Defined"), 3.01 ("Aiding and Abetting—Defined"), 3.02 ("Principals—Liability for Natural and Probable Consequences"), and 3.03 ("Termination of Liability of Aider and Abettor").

On January 12, 2012, the jury found Richardson guilty of first degree murder and found true the allegation that he had personally used a firearm. It found untrue the allegations that he had "personally and intentionally discharged a firearm and caused great bodily injury or death to WAYL AL JUNAIDI" and that he had "personally and intentionally discharged a firearm."

Richardson, who was 16 years old at the time of the offense, was sentenced on February 17, 2012, to state prison for a term of 35 years to life. The term consisted of 25 years to life for first degree murder and an additional consecutive 10-year sentence for the firearm use enhancement. Richardson filed a notice of appeal on February 21, 2012.

DISCUSSION

Richardson's appeal challenges both his conviction and his sentence. He first contends his murder conviction violates the due process clause of the Fourteenth Amendment because it depends on the application of the natural and probable consequences doctrine. In Richardson's view, this doctrine cannot properly be applied to a 16-year-old defendant, because it infers that a juvenile's intent meets the objective standard of a normal adult, even though a minor's neurological capacity cannot meet that of an adult brain.

On related grounds, Richardson argues that his sentence violates the Eighth Amendment's prohibition on cruel and unusual punishment because it is based on the erroneous presumption that he harbored the same intent as an adult offender. Under this argument heading, Richardson makes a number of claims, all of which are based on the premise that as a juvenile, he was necessarily less culpable than an adult offender. He claims his sentence is invalid because it failed to account in any way for his age.

We will first address the challenge to Richardson's murder conviction and then turn to the arguments regarding his sentence.

I. *Because Richardson Was Convicted of First Degree Felony Murder, Lack of Intent to Kill Was Irrelevant.*

Richardson first contends his conviction violates the due process clause of the Fourteenth Amendment because it depended upon the application of the natural and probable consequences doctrine. In Richardson's view, the natural and probable consequences doctrine improperly infers that the intent of a 16-year-old defendant can meet the same objective standard of that of a normal adult, when in fact a minor's neurological capacity is less. Relying principally on the United States Supreme Court's decision in *Miller v. Alabama* (2012) 132 S.Ct. 2455 (*Miller*), he argues that the natural

and probable consequences doctrine cannot constitutionally be applied to juveniles "as it does not comport with modern understanding of brain development." As we explain, because Richardson concedes he was convicted on a felony murder theory, the natural and probable consequences doctrine is not relevant to our analysis.

As Richardson notes in his opening brief, in the court below, "[t]he prosecution relied upon the felony murder doctrine in this case which did not require that [it] prove any mental state [other] than the commission of the underlying felony." Richardson also agrees that "[t]he jury's verdict *rested upon this felony murder rule* but not before they asked questions about it." (Italics added.) Despite his recognition that the jury's verdict was based upon the felony murder rule, Richardson nevertheless argues that he was improperly convicted as an aider and abettor under the natural and probable consequences doctrine.[3] He claims that "the application of the natural and probable consequences doctrine to infer the intent of a juvenile offender violates the due process clause of the Fourteenth Amendment." He contends that as a minor, he was too young to have been able to foresee that "a robbery is likely to become a killing" and thus was unable to understand the possible consequences of his actions. Because he was incapable of understanding those consequences in the way an adult would, he asserts that one cannot infer his intent to kill from his mere participation in a robbery.

A. *Aiding and Abetting and Felony Murder Are Distinct Theories of Liability.*

Richardson's argument is fundamentally flawed because he fails "to distinguish between felony murder and aiding and abetting theories of murder, which comprise two separate doctrines. . . . [¶] [¶] Aiding and abetting is a distinct theory of homicide. Unlike the felony-murder theory, the question of guilt as an aider and abettor is one of legal causation. 'Thus, the ultimate factual question is whether the perpetrator's criminal act, upon which the aider and abettor's derivative criminal liability is based, was ' "reasonably foreseeable" ' or the probable and natural consequence of a criminal act

[3] Although it is not clear from Richardson's brief, we understand his argument to be that he was convicted of felony murder on the basis of having aided and abetted the robbery in the course of which Al Junaidi was killed.

encouraged or facilitated by the aider and abettor.' [Citation.]" (*People v. Escobar* (1996) 48 Cal.App.4th 999, 1018-1019 (*Escobar*), overruled on another point in *People v. Mendoza* (2000) 23 Cal.4th 896, 923-924.)

Liability for first degree felony murder, on the other hand, requires no such foreseeability. " 'All murder . . . which is committed in the perpetration of, or attempt to perpetrate [certain enumerated felonies including robbery and burglary] . . . is murder of the first degree.' " (Pen. Code, § 189.) The mental state required is simply the specific intent to commit the underlying felony [citation], since only those felonies that are inherently dangerous to life or pose a significant prospect of violence are enumerated in the statute. [Citations.] 'Once a person has embarked upon a course of conduct for one of the enumerated felonious purposes, he comes directly within a clear legislative warning—if a death results from his commission of that felony it will be first degree murder, regardless of the circumstances.' [Citation.]" [¶] The purpose of the felony-murder rule is to deter those who commit the enumerated felonies from killing by holding them strictly responsible for any killing committed by a cofelon, whether intentional, negligent, or accidental, during the perpetration or attempted perpetration of the felony. [Citation.] 'The Legislature has said in effect that this deterrent purpose outweighs the normal legislative policy of examining the individual state of mind of each person causing an unlawful killing to determine whether the killing was with or without malice, deliberate or accidental, and calibrating our treatment of the person accordingly. Once a person perpetrates or attempts to perpetrate one of the enumerated felonies, then in the judgment of the Legislature, he is no longer entitled to such fine judicial calibration, but will be deemed guilty of first degree murder for any homicide committed in the course thereof.' [Citation.]" (*People v. Cavitt* (2004) 33 Cal.4th 187, 197 (*Cavitt*).)

B. *Conviction of Felony Murder Required No Proof of Richardson's Intent to Kill the Victim.*

In *People v. Dillon* (1983) 34 Cal.3d 441 (*Dillon*), a case involving a juvenile defendant, our state Supreme Court explained that the two kinds of first degree murder in California "differ in a fundamental respect: in the case of deliberate and premeditated

murder with malice aforethought, the defendant's state of mind with respect to the homicide is all-important and must be proved beyond a reasonable doubt; *in the case of first degree felony murder it is entirely irrelevant and need not be proved at all*." (*Id.* at pp. 476-477, italics added, fn. omitted.) A consequence of this distinction is "that first degree felony murder encompasses a far wider range of individual culpability than deliberate and premeditated murder. It includes not only the latter, but also a variety of unintended homicides resulting from reckless behavior, or ordinary negligence, or *pure accident*; it embraces both calculated conduct and acts committed in panic or rage, or under the dominion of mental illness, drugs, or alcohol; and it condemns alike consequences that are highly probable, conceivably possible, or *wholly unforeseeable*." (*Id.* at p. 477, italics added.)

Thus, *Dillon* forecloses Richardson's intent-based argument. Under *Dillon,* Richardson's intent was irrelevant in determining whether he had committed the crime of first degree felony murder.[4] (*Dillon, supra,* 34 Cal.3d at pp. 476-477.) "Indeed, the felony-murder rule is intended to eliminate the need to plumb the parties' peculiar intent with respect to a killing committed during the perpetration of the felony." (*Cavitt, supra,* 33 Cal.4th at pp. 197-198.) For this reason, "it is no defense to felony murder that the nonkiller did not intend to kill, forbade his associates to kill, or was himself unarmed." (*Id.* at p. 198, fn. 2.)

Similarly, Richardson's claimed inability to foresee the natural and probable consequences of his actions also makes no difference, because first degree felony murder encompasses crimes that are "wholly unforeseeable." (*Dillon, supra,* 34 Cal.3d at p. 477.) Where, as in this case, the killing occurred during the course of an independent

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[4] Citing *Miller, supra,* 132 S.Ct. 2455, Richardson argues that because juveniles have a " ' "lack of maturity and an underdeveloped sense of responsibility," ' " (*id.* at p. 2464), his lack of intent *should* be relevant to his liability for felony murder. But the California Supreme Court's felony murder case law makes clear that intent is not an issue in determining liability for killings that occur during the commission of certain enumerated felonies. (See *Cavitt, supra,* 33 Cal.4th at pp. 197-198; *Dillon, supra,* 34 Cal.3d at pp. 476-477.) As an inferior court, we are bound by those decisions. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

felony (robbery), Richardson's participation in the commission of that crime made him liable for the murder committed during the course of the robbery, even if the killing was *not* a natural, reasonable, or probable consequence of that crime. (See *People v. Anderson* (1991) 233 Cal.App.3d 1646, 1658 (*Anderson*) [appellants, who aided and abetted robbery, could be held liable for felony murder; instruction on natural and probable consequences properly refused].) "Thus, *Anderson* makes clear that accomplices are liable for felony murder even if the killing was not a natural and probable consequence. This rule is in accord with the general principle that felons are liable for felony murder without any strict causal relation and even if accidental or 'wholly unforeseeable.' " (*Escobar, supra,* 48 Cal.App.4th at p. 1019.) The cited cases compel us to reject Richardson's argument.

C. *Richardson Was Not Merely an Aider and Abettor, so the Natural and Probable Consequences Doctrine Does Not Apply.*

Richardson's contentions also cannot be reconciled with his admitted role in commission of the offense. He does not dispute that he was a *participant* in the robbery that led to Al Junaidi's death, and the jury specifically found that Richardson had personally used a firearm. Thus, as the Attorney General points out, Richardson was not merely an aider and abettor of the *robbery,* even though the jury apparently was not convinced he fired the fatal shot. Since Richardson was an actual perpetrator of the underlying felony and not an aider and abettor, the natural and probable consequences doctrine does not apply. (See *People v. Beeman* (1984) 35 Cal.3d 547, 554-555 [term " 'aider and abettor' " refers to "principals *other than the perpetrator*"], italics added; *People v. Prettyman* (1996) 14 Cal.4th 248, 254, 259-261 [explaining that aider and abettor is liable as accomplice to actual perpetrator and is thus responsible under natural and probable consequences doctrine].) By committing robbery, a felony the Legislature has deemed inherently dangerous to human life, Richardson became strictly liable for any killing committed by a cofelon, even if the killing was entirely accidental. (*Cavitt, supra,* 33 Cal.4th at p. 197; *Dillon, supra,* 34 Cal.3d at p. 477.)

Finally, even if the natural and probable consequences doctrine were somehow relevant here, it still would not assist Richardson.[5] It is difficult to understand how the victim's death "could have been an unnatural or improbable consequence" of Richardson's acts. (*Anderson, supra,* 233 Cal.App.3d at p. 1662 [assuming nonkiller did no more than tell gunmen about the location of drug dealer victims and instruct gunmen in how to attack and rob them, victims' death was natural and probable consequence of nonkiller's actions].) Even at age 16, "[a]ppellant had to be aware use of a gun to effect the robbery presented a grave risk of death." (*People v. Hodgson* (2003) 111 Cal.App.4th 566, 580 [referring to minor who was 16 years old when crime was committed].) Even if we were to indulge the counterfactual assumption that Richardson did no more than aid and abet the robbery, he could still be held liable for Al Junaidi's murder under the natural and probable consequences doctrine. (*People v. Em* (2009) 171 Cal.App.4th 964, 969-971, 976 [defendant who was 15 years and 9 months old at time of offense liable under natural and probable consequences doctrine for felony murder occurring during commission of armed robbery].)

II. *Richardson's Sentence Does Not Violate the Eighth Amendment*.

Richardson next contends his sentence of 35 years to life violates the Eighth Amendment because it is based on the presumption he harbored the same intent as an adult offender. He argues that his sentence is unconstitutional because he was 16 years old when he committed the offense, but he was tried and punished as an adult without any finding he had a specific intent to kill.[6] Although his argument is not a model of clarity, his essential claim is that his sentence is unconstitutional because of his youth, his

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[5] We note that Richardson's trial counsel agreed the trial court should respond to the jury's inquiry by giving the standard CALJIC instructions on the liability of an aider and abettor. Counsel did not ask that the instructions be modified in any way. Thus, insofar as Richardson claims the instructions were too general or incomplete on the facts of this particular case, he has forfeited that claim. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1163.)

[6] Richardson does not appear to claim the lower court erred in trying him as an adult. His failure to object below to trial in adult court would have forfeited such a claim in any event. (E.g., *People v. Cardona* (2009) 177 Cal.App.4th 516, 527.)

allegedly lessened culpability for the offense, the fact that the jury was not convinced he was the shooter, and because the sentence is disproportionate to his role in the crime.[7]

A. *Forfeiture*

The Attorney General argues Richardson has forfeited any claim that his sentence represents a cruel and unusual punishment by failing to raise this objection in the court below. (See, e.g., *People v. Burgener* (2003) 29 Cal.4th 833, 886 [cruel and unusual punishment claim forfeited by failure to object in trial court].) Richardson responds by asserting that the forfeiture doctrine does not apply here because the "legal foundations" for his argument did not exist at the time he was sentenced. As he relies on case law that post-dates his sentencing, we will consider his claim on the merits.

B. *Because Richardson Was Not Sentenced to Life Without Parole or its Functional Equivalent, His Sentence Is Not Cruel and Unusual.*

Richardson relies on a number of United States Supreme Court cases for the proposition that the imposition of punishment on offenders who were juveniles at the time their crimes were committed requires what he calls "special analysis."[8] All of these cases are distinguishable from the one before us, however, because they involved juveniles whose sentences were either: (1) death (*Roper, supra,* 543 U.S. at pp. 578-579), (2) life without possibility of parole (LWOP) (*Miller, supra,* 132 S.Ct. at p. 2460; *Graham,* 130 S.Ct. at p. 2020), or (3) a term of years so long as to be the functional equivalent of LWOP (*Caballero, supra,* 55 Cal.4th at p. 268.) As the Fourth District recently explained, the cases dealing with the permissible length of a juvenile offender's

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[7] We note at the outset that Richardson's claim is inconsistent with the record. In arguing he has diminished personal culpability for the offense, Richardson's opening brief asserts "there was . . . no jury finding appellant personally used or possessed a firearm." This is incorrect. The jury specifically found true the enhancement allegation "that the defendant **EUGENE RICHARDSON** personally used a firearm." Indeed, Richardson notes this fact on the second page of his opening brief. Thus to the extent Richardson's claim of diminished culpability rests on the assertion that he did not use a gun in the commission of the robbery, it contradicts the jury's finding on this issue.

[8] In addition to *Miller, supra,* 132 S.Ct. 2455, he cites *Roper v. Simmons* (2005) 543 U.S. 551 (*Roper*), *Graham v. Florida* (2010) 560 U.S. ___, 130 S.Ct. 2011 (*Graham*), and *People v. Caballero* (2012) 55 Cal.4th 262 (*Caballero*).

sentence "follow a remarkably consistent pattern. There is a bright line between LWOPs and long sentences *with* eligibility for parole *if* there is some meaningful life expectancy left when the offender becomes eligible for parole. We are aware of—and have been cited to—no case which has used the *Roper–Graham–Miller–Caballero* line of jurisprudence to strike down as cruel and unusual any sentence against anyone under the age of 18 where the perpetrator still has substantial life expectancy left at the time of eligibility for parole." (*People v. Perez* (2013) 214 Cal.App.4th 49, 57, fn. omitted (*Perez*).)

In *Perez,* the court rejected an Eighth Amendment challenge by a 16-year-old defendant who had been sentenced to a term of 30 years to life in prison. (*Perez, supra,* 214 Cal.App.4th at pp. 51, 57-58.) The court acknowledged that "[h]ow *much* life expectancy must remain at the time of eligibility for parole of course remains a matter for future judicial development," but because the defendant in that case would be eligible for parole when he reached age 47, it held "there is plenty of time left for Perez to demonstrate, as the *Graham* court put it, 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.' [Citation.]" (*Id.* at pp. 57-58.) Because the defendant's sentence could not be considered a " 'functional' " or " 'de facto' " LWOP, neither *Miller, Graham,* nor *Caballero* applied, and *Roper* did not apply because it was a death penalty case. (*Id*. at p. 58.)

This case is similar to *Perez.* Richardson, who was 16 at the time of his offense, was sentenced to a total of 35 years to life and was given 911 days of credit for time served. He will become eligible for parole long before the end of his life expectancy. Like the juvenile defendant in *Perez,* Richardson will have ample time to obtain release based on demonstrated maturity and rehabilitation. (*Perez, supra,* 214 Cal.App.4th at pp. 57-58.) Thus, for the reasons stated in *Perez,* we conclude that the *Roper–Graham–Miller–Caballero* line of cases does not assist Richardson.[9]

[9] Richardson also relies on Justice Breyer's concurring opinion in *Miller* to argue that it is improper to apply to juvenile offenders the doctrine of transferred intent underlying the felony murder rule. (See *Miller, supra,* 132 S.Ct. at pp. 2476-2477 (conc. opn. of Breyer,

Richardson also argues that his sentence violates the Eighth Amendment simply because it failed to account in any way for the fact that he was a juvenile at the time of the offense. This argument is again based on the *Roper–Graham–Miller–Caballero* line of cases and their recognition of the diminished culpability that results from minors' immaturity. And here again, we find *Perez, supra,* 214 Cal.App.4th 49 instructive. The defendant in that case contended that "California's one strike law is unconstitutional as applied to minors because it deprives trial courts of the discretion to take into account what the *Miller* and *Roper* majorities described as the 'what "any parent knows" ' factor."[10] (*Id.* at p. 58.) The *Perez* court rejected the argument because the *Roper–Graham–Miller* line of cases concerned juvenile "offenders [who] had been exposed to the 'harshest' available sentence." (*Id*. at p. 59.) Unlike *Roper, Graham*, and *Miller, Perez* was not an LWOP case and the state's most severe penalties were not at stake. (*Ibid*.) The *Perez* court refused to fashion "a judicially imposed rule of mandatory discretion, namely that no matter how heinous the crime— *or how mild the penalty otherwise imposed on adults*—the federal and state cruel and unusual punishment clauses require states to hold out some possibility of discretionary reduction in *that* penalty to take into account an offender's youth." (*Ibid*.) It went on to note that "at the moment at least, no high court has articulated a rule that *all* minors who commit adult crimes and who would otherwise be sentenced as adults *must* have the opportunity for some

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J.).) We note first that a concurring opinion — even that of a justice of the United States Supreme Court — is not binding precedent. (See *Mosesian v. McClatchy Newspapers* (1988) 205 Cal.App.3d 597, 607.) Moreover, the passage from Justice Breyer's opinion upon which Richardson relies addressed a situation not present here. Justice Breyer found it improper "[t]o apply the doctrine of transferred intent here, where the juvenile did not kill, *to sentence a juvenile to life without parole*[.]" (*Miller, supra,* 132 S.Ct. at pp. 2476-2477 (conc. opn. of Breyer, J.), italics added.) As explained in the text, Richardson's sentence is neither an LWOP nor its functional equivalent.

[10] The quoted language is taken from *Roper,* which explained that "as any parent knows . . . , '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.' [Citation.]" (*Roper, supra,* 543 U.S. at p. 569.)

discretionary reduction in their sentence by the trial court to account for their youth. Perez's sentence, albeit long, still leaves plenty of time for him to be eligible for parole. It passes constitutional muster." (*Ibid*., fn. omitted.)

Richardson likewise offers no case authority holding that all minors must have the opportunity for a discretionary reduction in their sentences based on their youth. Current law contains no such requirement, and it seems to us that creation of such a requirement is a matter best left to the Legislature. (*Perez, supra,* 214 Cal.App.4th at p. 59; see *Caballero, supra,* 55 Cal.4th at p. 269, fn. 5 [urging Legislature to establish parole eligibility mechanism for defendants serving de facto LWOP sentences for nonhomicide crimes committed as juveniles].) Like the defendant in *Perez,* Richardson's sentence, while long, leaves him ample time to be eligible for parole. We therefore disagree with Richardson that his sentence offends the Eighth Amendment. (See *Perez, supra,* 214 Cal.App.4th at p. 59.)

C. *Richardson's Sentence Is Not Disproportionate to His Culpability.*

Although he does not make the argument under a separate heading, Richardson's opening brief states at various points that his sentence is disproportionate to his culpability. As the argument is not presented under a separate heading, we may deem it forfeited. (*People v. Roscoe* (2008) 169 Cal.App.4th 829, 840.) Despite this defect, we will address the contention briefly.

The basic test of a cruel or unusual punishment under the California Constitution is whether it is so disproportionate to the crime as to shock the conscience and offend fundamental notions of human dignity. (*Dillon, supra,* 34 Cal.3d at p. 478; *In re Lynch* (1972) 8 Cal.3d 410, 424.) The focus of the analysis is on the nature of the offense and the nature of the offender. (*Dillon, supra,* at p. 479.) The court must consider both the nature of the offense in the abstract and the facts of the crime in the particular case, including factors such as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences. (*Ibid*.) With respect to the nature of the offender, the question is whether the punishment is "grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality,

personal characteristics, and state of mind." (*Ibid.*) The record must be viewed in the light most favorable to the sentence (*People v. Martinez* (1999) 76 Cal.App.4th 489, 496), and defendant must overcome a considerable burden in convincing us that his sentence is disproportionate. (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196-1197.)

Looking at the offense in the abstract, it is obvious that armed robbery presents a grave risk of death, a risk of which Richardson was certainly aware. (*People v. Hodgson, supra,* 111 Cal.App.4th at p. 580.) Furthermore, the facts of this particular case are that Richardson used a firearm to commit the crime, a factor that justifies a more severe punishment. (See *People v. Martinez, supra,* 76 Cal.App.4th at pp. 497-498.) In addition, as the probation officer's report notes, the manner in which the crime was carried out indicates planning. (Cal. Rules of Court, rule 4.421(a)(8).) Beyond his use of a firearm, Richardson's role in the offense was anything but trivial, since he was identified as the man who took Al Junaidi's possessions. And obviously, most significant in our evaluation of the seriousness of the offense must be the fact that the consequence of the crime was the victim's death.

Turning to the nature of the offender, Richardson asks us to give principal consideration to his youth. But here, unlike *Dillon,* there was no evidence that Richardson was especially immature for his age. (*Dillon, supra,* 34 Cal.3d at p. 483.) While it is true he had no prior criminal record, he used a deadly weapon in committing the robbery. He also argues there was no finding he harbored specific intent, because he was convicted under the natural and probable consequences doctrine. We have explained in part I, *ante,* that Richardson was not convicted based on this doctrine, and thus this argument is erroneous. Contrary to his contention, he did possess a specific criminal intent, as the jury was required to find that he harbored the specific intent to commit robbery. The intent to commit that offense was all that was required for conviction of felony murder. (*Cavitt, supra,* 33 Cal.4th at p. 197.)

In these circumstances, we cannot conclude that the sentence in Richardson's case is the type of "exquisite rarity" that will support a successful proportionality challenge. (*People v. Weddle, supra,* 1 Cal.App.4th at p. 1196.)

DISPOSITION

The judgment is affirmed.

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Jones, P.J.

We concur:

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Needham, J.

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Bruiniers, J.